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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1928.

No. 667.

WILLIAM ROSCHEN,

Appellant,

against

HAMILTON WARD, Attorney General of the State of New York; JOAB H. BANTON, District Attorney of New York County, New York, and WILLISTON W. BISSELL, HARLOW M. FULLER, THOMAS McBURNIE, WILLIAM L. COOK and FREDERIC A. WOLL, constituting The Board of Optometry Examiners of the State of New York,

Appellees.

No. 668.

S. S. KRESGE COMPANY,

Appellant,

against

HAMILTON WARD, Attorney General of the State of New York; JOAB H. BANTON, District Attorney of New York County, New York, and WILLISTON W. BISSELL, HARLOW M. FULLER, THOMAS McBURNIE, WILLIAM L. COOK and FREDERIC A. WOLL, constituting The Board of Optometry Examiners of the State of New York,

Appellees.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANTS

W. N. SELIGSBERG,
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March 18, 1929.

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APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANTS.

1.

Opinion of the Court Below.

The opinion of the statutory court appears in the record at page 71. It is reported *D. S. Kresge Company* v. *Ottinger*, 29 Fed. (2d) 762.

2.

Jurisdiction.

These are appeals from final decrees of a statutory court in the Southern District of New York entered January 4, 1929, by which the Court denied plaintiffs' motions for preliminary injunction and dismissed the bill of complaint in each case (R., 80).

The suits were filed at about the same time by plaintiffs, for the purpose of procuring injunctions restraining defendants from enforcing the provisions of Chapter 379 of the Laws of New York of 1928, adding a new section, Section 1432-A, to the Education Law of the State of New York.

The suits were originally instituted against Albert Ottinger, Attorney General, and upon the expiration of his term, Hamilton Ward, his successor, was, by consent, substituted (R., 79 and 94). With the exception of the complaints, the cases were heard upon identical papers,—the notice of motion in the *Kresge* case referring to the affidavits submitted in the *Roschen* case (R., 89).

Sec. 266 of the Judicial Code provides for a direct appeal to this Court not only from the denials of interlocutory injunctions but from the dismissals of bills.

3.

Statement of the Case.

The Education Law of New York is a comprehensive statute providing not only for the government and regulation of schools of all grades, public and private, but also providing for the regulation of most of the professions,—Medicine, Dentistry, Pharmacy, Chiropody, Nursing, Veterinary, Science, Engineering and Architecture and,—the particular subject embraced in the suits,—Optometry. The regulations vary in strictness and detail for the different activities and, in most, if not all, cases provide not only for regulation and supervision by Special Boards, but for prosecutions and violations of the law and regulations by the Attorney General (Sec. 1413 Chiropody; Sec. 1362 subd. 12 Pharmacy; Sec. 1339 Veterinary Science; Sec. 1433 Optometry).

The scheme of the law is sensible, placing the burden of examination and adoption of regulations and investigating violations generally on the officers and employees of the appropriate Bureau, and placing the prosecution of violations and the collection of penalties in the hands of the Attorney General.

Article 54 of the Law, consisting of 13 sections, deals with the subject of Optometry. A summary of the more important provisions follows:

The article defines the practice of Optometry as follows (Sec. 1425):

> "A person practices optometry within the meaning of this article who by any means or methods, other than by the use of drugs, diagnoses any optical deficiency or deformity, visual or muscular anomaly of the human eye, or prescribes lenses, prisms or ocular exercises for the correction or relief of the same, or who holds himself out as being able so to do. * * *"

The selling of spectacles and lenses is not the practice of optometry,—nor is it the practice of medicine (Education Law, Sec. 1262).

It provides (Sec. 1426) for a Board of Examiners, gives them power to make rules and regulations not inconsistent with law (Sec. 1427); provides for examinations (Sec. 1428); makes provision for the issuance of degrees in Optometry (Sec. 1429); provides for the issuance of certificates of qualification (Sec. 1428) and for the recording of the same in public offices in the district where the optometrist resides and practices and for display of a certificate at the place of business (Sec. 1430). It provides for the revocation of certificates (Sec. 1432).

It then provides by the additional new section now under attack, as follows:

> "It shall be unlawful for any person, firm or corporation to sell, at retail, as merchandise, in any store or established place of business in the state, any spectacles, eyeglasses, or lenses for the correction of vision, unless a duly licensed physician or duly qualified optometrist, certified under this article, be in charge of and personal attendance at the booth, counter or place, where such articles are sold in such store or established place of business. The peddling of spectacles, eyeglasses or lenses from house to house or on the streets or highways, by a person other than such an optometrist or physician, also shall be unlawful, notwithstanding any law providing for licensing peddlers."

It then forbids the practice of Optometry (Sec. 1433) by unregistered persons, provides against fraud and for the enforcement of the law. It then (Sec. 1434) exempts physicians from the application of the law, and also exempts the sale of toy glasses and certain other kinds of glasses from the operation of the law, exempts the filling of prescriptions from physicians and optometrists, and the duplication of broken lenses from the law. It then provides for the administration of the law under Sec. 51 of the Education Law.

Sec. 51 provides for the regulation of examinations, licensing and practice of the profession by the Regents of the University.

The final section of the Optometry Article contains a saving clause with respect to the unconstitutionality of any part of the law.

With the exception of Sec. 1432-A, which the plaintiffs attack as unconstitutional, the law provides a comprehensive scheme of regulation of the practice of Optometry, that is to say, diagnosis and treatment other than by the use of drugs, of any optical, deficiency or deformity, and the prescription of lenses, prisms or other ocular exercises for the correction of the same.

The new section,—1432-A,—attempts to extend the scope of the law to the *sale* of spectacles as merchandise without diagnosis and without prescription.

The record shows, and it is not disputed, that the plaintiffs are engaged in selling only one type of spectacles, namely, spectacles with convex spherical lenses,—in the language of the street—magnifying glasses.

The plaintiff's papers show, and it is not seriously disputed, that spectacles of this type merely magnify and cannot in any way harm vision. It is true that in the voluminous answering affidavits, many loose statements are made, but there is not in the whole record one reference to a case or one statement by a qualified person, that the use of convex spherical lenses has ever been, or can ever be injurious to human vision.

The plaintiff's position is that under the guise of regulating the practice of a profession, the Legislature has attempted to destroy a useful business, kindred to the profession but in no way purporting to usurp the functions of a professional practitioner. The plaintiffs do not examine eyes; they do not diagnose ailments; they do not prescribe any remedies or cures by way of lenses, spectacles or otherwise (R., 2, 84); they simply sell, over the counter, to their customers spectacles with lenses which help the ordinary changes in vision due to increasing age, and which are not and cannot, under any circumstances, be a detriment to the purchaser.

Nowhere does the law forbid the continued sale of spectacles without examination, diagnosis or prescription. If this law be valid, it is still quite permissible for the plaintiffs, or for registered optometrists or for physicians, to sell spectacles in just exactly the manner in which the plaintiffs have been selling them for years, with the one exception,—that while the physicians and the optometrists may sell these spectacles without restriction, the plaintiffs and other merchants may only sell them *if* a licensed physician or a registered optometrist be in personal attendance and in charge of the place where the sale is made.

Unlike the kindred regulation with respect to pharmacists, the law under discussion does not require the optometrist to be in personal attendance in his place of business and to be personally responsible for the work of his subordinates (Education Law, secs. 1425-36). All the optometrist must do is have his certificate on display (Sec. 1430).

The plaintiffs submit that this section of the Optometry Law is only valid if its enforcement has some reasonable relation to the public welfare; that the portions of the law attacked have no such reasonable relation; that their true purpose is obvious on the face, and that is, to provide employment for optometrists without requiring, directly or by reasonable implication, any service to the public or any benefit to the public as a result of such employment.

In final analysis, the questions in this case resolve down to two, viz:

1. Do magnifying lenses sold by plaintiffs contain any potentiality for harm justifying interference with their free sale?

2. Does the mere presence of a physician or an optometrist in the place at which spectacles are sold serve the public in any way?

Plaintiffs intend to urge the errors assigned in each of the two assignments of error (R., 82, 97).

Summary of the Argument.

1. The magnifying glasses sold by plaintiffs are harmless in themselves and cannot possibly do any injury.

2. Sec. 1432-A of the Education Law makes no requirement for examination of the eye, diagnosis of the ailment, or prescription for remedy or cure when spectacles are sold, and it neither forbids nor imposes any penalty upon the sale of spectacles without such examination, diagnosis or cure.

3. Sec. 1432-A is not reasonably calculated to promote the public health, and has no real and substantial relation to that end.

4. The propriety of granting equitable relief in these cases is clear.

5. The Court below erred in its construction of the statute, and its decision.

6. The Court below erred in its reasons for dismissing the bill as against the defendants other than the Attorney General.

7. The decrees appealed from should be reversed, the preliminary injunctions should be granted, and the cases restored for trial.

POINT 1.

The magnifying glasses sold by plaintiff are harmless in themselves and cannot do any injury.

The complaint in the *Roschen* case alleges in paragraphs 7 and 8 the following (R., 2):

> "7. All of the spectacles sold by plaintiff contain so-called convex spherical lenses, that is, lenses that are merely convex and whose sole aid to vision is that

they magnify what the eye sees. Plaintiff has never sold any spectacles containing other than convex spherical lenses.

8. Plaintiff is advised and believes and alleges that the use of convex spherical lenses in spectacles will not injure the sight. All that convex spherical lenses in spectacles do is to magnify the object at which they are directed, and it is to that extent that they facilitate vision."

The complaint in the *Kresge* case contains similar allegations in paragraphs 9 and 10 (R., 85).

No answers were filed by any of the defendants. So that on this record these allegations stand *admitted*.

The affidavits submitted by plaintiffs substantiate these allegations of their complaints.

Mr. Miller, who has been in the business for over 50 years, states:

"In all my experience of over 50 years in the optical business I have never heard or known of any case in which the use of convex spherical lenses has in any wise harmed the eye or the vision of any person wearing the same, nor can I understand how the use of convex spherical lenses can do any harm. I do understand that some cases of defective vision, near-sightedness or other more serious defects cannot be aided by the use of convex spherical lenses, but that would be obvious to any person suffering from such trouble who tried to use them. They would not aid his vision" (R., 9).

Nor are these allegations substantially disputed by any of the affidavits submitted in opposition to the injunction motions.

Dr. Sullivan, who is Assistant Commissioner of Education (R., 27), is not an optometrist nor a physician (R., 28). He states certain conclusions but without any substantiation.

Mr. Morehouse, who does not state any qualifications except that he is president of an association for the blind (R., 30), states (R., 31):

> "Our association has found, in its experience, that considerable blindness has resulted from the use of improper eyeglasses or spectacles, and that the State ought to exercise its police power to protect the people against blindness and against the unscientific, unethical, and dangerous practice of the manufacture, sale and distribution of eyeglasses or spectacles."

Mr. Morehouse's qualifications do not appear, nor is his statement directed to the kind of spectacles sold by the plaintiffs—convex spherical lenses.

Mr. Henry, who also seems to be a layman, that is, not an optometrist nor a physician, quotes a circular issued by his association (R., 36) urging the avoidance of cheap glasses.

> "Their imperfections may be worse than no glasses at all. Glasses cannot be fitted by mail" (R. 37).
>
> "Eyeglasses cannot be properly fitted by mail or over a merchant's counter."

There is nothing in this affidavit which can be deemed a denial of the allegations in plaintiff's complaint.

Mr. Kiekenapp is an optometrist. His affidavit assumes erroneously to construe the law attacked by these bills as one making an examination, diagnosis and prescription by an optometrist and a physician a prerequisite to a sale of spectacles. He agrees, however, that acceptance of even prescribed glasses is a condition to their utility,—that is, not only must the glasses be scientifically correct but they must satisfy the patient (R., 47). Mr. Kiekenapp's affidavit is long but largely irrelevant because it argues the advantage of scientific examination for the use of spectacles. It does not cite a single instance in his experience nor in the experience of the profession to indicate that anyone was ever injured or could be injured by the use of magnifying glasses.

Mr. Ryer, also an optometrist (R., 52) denies that magnifying glasses magnify (R., 54). Just what this denial means it is impossible to tell because our common experience teaches us that the magnifying lense does magnify; but Mr. Ryer frankly admits that convex lenses may help people to see

better (R., 55), although he says that by the use of convex lenses serious conditions may be overlooked. Mr. Ryer also emphasizes the necessity of subjective tests (R., 57).

Finally and perhaps the best comment on the utility of the business of these plaintiffs is the article published in one of the trade papers before this suit was commenced and a week before the statute in question came into existence (Exhibit C, printed between pp. 22 and 23 of the record). The article was read at the meeting of the Virginia Academy of Optometry by Dr. Frank D. Jackson, and he comments on the fact that the optometrist must not only meet the physical condition but the mental condition of his patient. Dr. Jackson emphasizes the fact that an optometrist's prescription may vary from the exact requirements of the optical condition because it must be acceptable to or tolerated by the patient.

We quote from the article:

> "Sometimes the same accurate prescription that fits the eyes also suits the mind; many times a modification of it must be made, if the patient is to be satisfied. * * * It is, in fact, useless and thankless to fit a 98-cent grade of intelligence with $8 lenses; in fact, from the standpoint of the 98-cent mind, such lenses are a mis-fit; hence the lack of satisfaction. * * *
>
> The accurate and scientific Optometrist may be rejoiced at first—note that I say 'at first'—when he gets a case from the office of the unskilled man and truthfully criticises the accuracy of the previous correction, which probably has not given entire satisfaction, after all. The former feels no hesitancy in saying that he will turn out a more satisfactory fit; he is presuming, of course, that a more accurate refraction will be the more satisfactory. Later, he is dismayed to learn that his nice work is not more satisfactory, and is often less satisfactory than the crude work of his predecessor in the case.
>
> The point may be raised that the accurate correction ought to be also a satisfactory one; it is, in many cases, and in many cases only the most exact of corrections are endurable, and these must be figured down to the eighth diopter in sphere and cylinder, and the half degree of axis—and in weak corrections, too. But these

are not the cases of the 98-cent minds; there's the difference that makes all the difference.

So, to consider optometric success from the business standpoint, the Optometrist must bring to bear a fine discrimination, a delicate balancing of judgment, a measuring of the temperament, an estimation of the personal equation of the patient, that the work may give satisfaction. For an Optometrist indeed feels humiliated if his higher knowledge, his elaborate equipment, his shiny scopes and mometers turn out, after all his care, *a less satisfactory pair of glasses than the patient might have picked out at the 98-cent counter*" (Italics ours).

The figures offered by the plaintiffs as to the extent of the spectacle business in the State of New York are undisputed. Mr. Miller's estimate is that over half a million pairs of spectacles fitted with convex spherical lenses are sold in New York every year over the counter. With this tremendous volume of sales, it is remarkable that neither the expert nor the inexpert affiants whose opinions were submitted to the Court below by any of the parties could cite from all the history of optometry a single instance where anyone had been injured by the use of convex spherical lenses, and the plaintiffs respectfully submit that on this record it must be taken as admitted that convex spherical lenses will not injure the wearer in any manner.

POINT 2.

Section 1432 (a) of the Education Law makes no requirements for examination of the eye, diagnosis of the ailment or prescription for remedy or cure when spectacles are sold and it neither forbids nor imposes any penalty upon the sale of spectacles without such examination, diagnosis or prescription.

A.

GENESIS OF THE LAW.

The statute under attack is a typical product of loose draftsmanship, which implies loose thinking. It deals with the sale of spectacles, eye-glasses and lenses as merchandise at retail. It provides:

> "**Sales of eye-glasses, spectacles and lenses at retail.** It shall be unlawful for any person, firm or corporation to sell, at retail, as merchandise, in any store or established place of business in the state, any spectacles, eye-glasses, or lenses for the correction of vision unless a duly licensed physician or duly qualified optometrist, certified under this article, be in charge of and personal attendance at the booth, counter or place, where such articles are sold in such store or established place of business * * *"

What was the genesis of this law? Literally, we may venture to say it was conceived in iniquity. It was planned at a meeting attended by optometrists, at which was present the attorney for the State Optometric Association,—a member of the New York State Legislature. The committee working with its attorney, the legislator (R., Ex. B—after p. 22),

> "* * * worked unceasingly in the interest of this piece of legislation" (R., *idem*),

but its work was done with secrecy.

> "Every opportunity for strategy was taken advantage of and instead of the usual blowing of trumpets and an out in the open campaign, it was decided that a quiet under tunnel manuevre be employed. * * *" (R., *idem*).

Why was this done so secretly? Because in 1925, this Bill had not only the opposition of the chain stores but *"much professional opposition"* (R., *idem*—italics ours).

These facts are not imagined. They are stated directly, upon the specific authority of the report of the Legislative Committee of the State Optometric Association, reported in the Optometric Weekly, July 5, 1928, page 684, and set forth as Exhibit B to DeYoung's affidavit (R., 13-22).

What did the sponsors of this bill intend to accomplish? They intended to enact

> "a law * * * prohibiting the sale of ready made glasses unless prescribed for the vision of the wearer by those legally qualified to examine eyes."

(See Bulletin of New York Optometric Society, October, 1928, p. 7.)

Such a bill they certainly did not succeed in drafting and in having enacted.

Defendants make it clear by the affidavits which they submit that the law which they would consider helpful to the public is one which requires examination, diagnosis and prescription in connection with the sale of spectacles. Dr. Sullivan says (R., 27) that he "urged the legislature and the governor to exercise the police power of the state to protect people not only from self-imposed injury, but against the unfair and illegitimate marketing of eyeglasses which were ultimately sold without any semblance of scientific or professional approximations or accuracies." Mr. Kiekenapp (R., 41) construes the law to mean that there must be a diagnosis before a sale of spectacles. Mr. Ryer insists (R., 62) that, "Scientific examinations of the human eye are absolutely essential to the protection of the vision of the people of the state."

Defendants' position seems to be that for the purpose of procuring *enforcement* of the law no examination, diagnosis or prescription is imposed upon the seller of spectacles, but that for the purpose of procuring *endorsement* of the law, it must be construed to require such preliminaries to a sale.

Nowhere in Section 1432-a is there a reference, by word or inference, to an examination of eyes, a test of vision, or a prescription for spectacles. Nowhere is there a suggestion that the sale of spectacles must be preceded by examination, test or prescription. All that is required is that at each place where spectacles are sold at retail

> "a duly licensed physician or duly qualified optometrist * * * be in charge of and personal attendance at the booth, counter or place where such articles are sold."

In a word, optometrists and physicians must be given jobs as store managers or countermen at an average expense of at least $50 weekly in each store (DeYoung, R., 22), an expense exceeding plaintiff's profits (R., 4, 87). But the customer can still come in, as before, select his glasses, buy them and pay for them without professional aid, and with perfect legality under the statute.

This was in substance admitted by the learned Assistant Attorney General upon the argument below. He said that the legislature "did *not* intend to restrict the sale and require that the optometrist personally hand every sale over the counter. They *did not* see fit to require that no person shall buy glasses without an examination * * *." (Italics ours.)

B.

The Statute Read in the Light of the New York Cases.

As we have seen, the words of the statute do not require examination, diagnosis or prescription. The next question that arises is, would the courts of New York construe the statute so as to read into it such requirements? Clearly not.

The courts of New York adhere to the rule expressed so well, by Mr. Justice Story (*infra*, p. 19), that it is not for courts of justice to supply the defects or mischiefs of imperfect legislation.

In *Leach* vs. *Aucell*, 154 App. Div. 170, the question was whether there could be an appeal to the Appellate Division, Second Department, from the Appellate Term, Second Department, from its decisions passing on Municipal Court judgment. The argument was made that since such an appeal is permitted in the Appellate Division, First Department, from its Appellate Term, there should also be one in the Second Department. The Court said (p. 176):

> "It is urged that as the Code provides for a second appeal in certain cases in the First Department and omits any provision therefor in the Second Department, this is imperfect legislation, but even so it may be answered in the words of Story, J., in Smith v. Rines (2 Sumn. 338),
>
> > 'It is not for Courts of Justice *proprio marte* to provide for all the defects or mischiefs of imperfect legislation,'
>
> which are cited and approved in Hobbs v. McLean, 117 U. S. 580, 6 Sup. Ct. 870, 29 L. Ed. 940.
>
> We cannot agree with the argument that there can be any application of the doctrine of *casus omissus*, for the rule does not permit the Court to go as far as virtually to make a law. United States v. Union Pacific R. R. Co., 91 U. S. 72-85, 23 L. Ed. 224; Hobbs v. McLean, supra, 117 U. S. 579, 6 Sup. Ct. 870, 29 L. Ed. 940."

In *Furey* vs. *Town of Gravesend*, 104 N. Y., 405, the Court of Appeals said, at page 410:

> "In giving a construction to this act, Courts are confined to the language and terms employed by the legislature, and are not at liberty to interpolate phrases and provisions, although otherwise the purpose and intention, of the law making power may seem indefinite, obscure or incomplete.
>
> If they have failed to insert such provisions in the law as will accomplish the result intended, their omission cannot be remedied by construction, and the law must, to that extent, be considered defective and inoperative."

In *Kennehan* vs. *City*, 162 App. Div. 364, the Second Appellate Division said (p. 365):

> "The case is controlled by the familiar rule of statutory construction that, if the Legislature fails to insert such provisions in the law as will accomplish the result intended, their omission cannot be remedied by construction, and the law must, to that extent, be considered defective and inoperative; the Court having no power to *interpolate* words or phrases. Furey vs. Town of Gravesend, 104 N. Y. 405, 410." (Italics ours.)

The statute makes a violation of the law a *crime* (Education Law, Section 1433), punishable by fine of between fifty and five hundred dollars, or both, and by a penalty of $100 for each offense.

The Courts of New York in such case would certainly refuse to *broaden* the construction of the law in a criminal prosecution.

In *People* vs. *Briggs*, 193 N. Y. 457, the Court of Appeals was dealing with a case in which a milk dealer had marked his milk bottles "Certified Milk, C. M. Briggs, Elma, N. Y.," but had failed to conspicuously mark on the bottles the name of the association certifying, as called for by the statute. The Court held that as the law made no provision for associations to certify milk, the provision of the statute was too vague. The opinion by Judge Haight is very clear (p. 459):

"The only default on the part of the defendant was, therefore, in not having the bottles in which the milk was sold '*conspicuously marked* with the name of the association certifying it.' What is meant by the term 'association'? Did the legislature intend by its use to refer to an association of milk dealers? Evidently not, for the purpose of the entire statute is to place restrictions upon the sale, by dealers, of milk that does not conform to its requirements. Did the legislature intend to refer to some association of doctors, lawyers or ministers? If so, to which? Is it a self-constituted, voluntary association, and if so, who are the persons composing it? It is quite possible that the legislature had in mind some sort of a medical association, but unfortunately it has failed to designate any particular association or individuals composing it, to whom the milk dealer could apply for the certification of his milk. This is a penal statute and a violator is not only liable for penalties but is also liable to be convicted for a misdemeanor, under which he may be punished by both fine and imprisonment. *In construing penal statutes it is not our practice to go beyond the clear meaning and purpose of the statute and we should not attempt to spell out the creation of a new offense which is not clearly indicated by the ordinary meaning of the words used.*" (Italics ours.)

In *People* vs. *Schmidt*, 221 App. Div. 77, the defendant has been convicted of unlawfully possessing a firearm. The defense was that the weapon he had was an air pistol and not a firearm. The Court said (p. 78):

> "The general principle applicable to all questions of construction involved in criminal cases must be followed, that penal statutes must be construed strictly in favor of the defendant."

Some suggestion has been made below that the words "in charge of * * * the booth, counter or place where such articles are sold * * *" require the optometrist or physician to examine and prescribe for prospective purchasers. Of course, to so read the law would be to do more than violence to the language. It presses the bubble till it bursts.

Tompkins v. *Hunter*, 149 N. Y. 117, by Martin, J., at page 122:

> "In construing statutes, it is a well-established rule that resort must be had to the natural signification of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction and courts have no right to add to or take away from that meaning."

We have searched the authorities and have discovered but few cases which shed any light on the construction of the expression "in charge of." In the case of

Holliday & Wyon Co. vs. *O'Donnell*,

decided in the Appellate Court of Indiana (44 Ind. App. Ct. 647), it was said by Rabb, P. J. (p. 654):

> "What is to be understood by the phrase, 'a person in charge of defendant's ways, works and machinery,' is by no means clear. A person in charge of ways, works and machinery may or may not have authority to direct workmen, owing entirely to the authority given him by the master. It does not carry the necessary inference that he was so authorized * * *."

See also

Poole vs. *American Linseed Co.*, 119 App. Div. 136

It is to be noted that in both of these cited cases, as in the statute under consideration in this case, the words "in charge of" referred to a place and not to persons, and there is nothing in the statute which makes the optometrist or physician in charge and personal attendance responsible for anything with respect to the sale of spectacles. He is required by the statute to be in charge of a place but not in charge of the personnel and no statutory obligation upon the person in charge could be predicated upon this language, and certainly no obligation which would render the owner amenable under the Penal Law. Further, it is notable that the selling of spec-

tacles is not included in the definition of the practice of optometry as selling medicines is defined as practising pharmacy, so that by this enactment the legislature has attempted to apply to an act not included in the definition of optometry, restrictions applicable only to professional acts.

The pharmacy provisions of the Education Law regulate the *conduct* of those who conduct, carry on or are employed in the retailing of drugs, etc. If that is what the legislature proposed to do with respect to the retailing of spectacles, why did it merely regulate the management of the place where they are to be sold?

Unless our Courts are to change their functions from judicial to legislative, no Court can reasonably read into this law a provision requiring more than the law itself requires, that is, the presence of a licensed person at the place where the sale of spectacles is made without any requirement that such licensed person prescribe or participate in the sale, or even be conscious thereof.

C.

THE STATUTE READ IN THE LIGHT OF THE DECISIONS OF THE FEDERAL COURTS.

Nor is the law as enforced by the Federal Court any different.

The leading case is *Smith* vs. *Rines*, 2 Sumn. 438 (Fed. Case 13,100), by Story, J.:

> "But if the mischief in such a case should be admitted to be irremediable, that is a consideration properly addressing itself to the national legislature to provide suitable means of redress for it. It is not for Courts of justice proprio marte to provide for all the defects or mischiefs of imperfect legislation."

A more recent, but no less forceful statement of the law, is to be found in *Yu Cong Eng.* vs. *Trinidad*, 271 U. S. 500,

involving the validity of the Philippine statute forbidding the keeping of books by merchants in any language other than English, Spanish or a local dialect. Complaint was made by Chinese merchants that they could not use either of these three languages. Some contention was made that the law could be construed as permitting the keeping of additional books in Chinese, though literally it made it "unlawful * * * to keep its account books in any language other than English, Spanish or any local dialect." This Court, by Mr. Chief Justice Taft, said, at page 518:

> "We fully concede that it is the duty of a Court in considering the validity of an act to give it such reasonable construction as can be reached to bring it within the fundamental law. *But it is very clear that amendment may not be substituted for construction, and that a Court may not exercise legislative functions to save the law from conflict with constitutional limitation.*
>
> One of the strongest reasons for not making this law a nose of wax, to be changed from that which the plain language imports, is the fact that it is a *highly penal statute* authorizing sentence of one convicted under it to a fine of not more than 10,000 pesos, or by imprisonment for not more than two years, or both. If we change it to meet the needs suggested by other laws and fiscal regulations and by the supposed general purpose of the legislation, we are creating by construction a vague requirement, and one objectionable in a criminal statute. We are likely thus to trespass on the provision of the Bill of Rights that the accused is entitled to demand the nature and cause of the accusation against him, and to violate the principle that a statute which requires the doing of an act so indefinitely described that men must guess at its meaning, violates due process of law." (Italics ours.)

Denn vs. *Reid*, 10 Pet. (U. S.) 524.

The question in this case was whether an act validating certain deeds proved by subscribing witnesses also validated the deed in question which was acknowledged by the grantor before a judge.

The Court said, by McLean, J., at page 527:

> "This, it must be admitted, when we consider the mischief the law was probably intended to remedy, is a somewhat technical construction of the act; and cases may be found where Courts have construed a statute most liberally to effectuate the remedy, but where the language of the act is explicit, there is great danger in departing from the words used, to give an effect to the law which may be supposed to have been designed by the legislature. Where the language of the act is not clear, and is of doubtful construction, a Court may well look at every part of the statute; at its title, and the mischief intended to be remedied in carrying it into effect. But it is not for the Court to say, where the language of the statute is clear, that it shall be so construed as to embrace cases, because no good reason can be assigned why they were excluded from its provisions."

Hobbs vs. *McLean*, 117 U. S. 567.

Plaintiffs were former partners of the decedent, whose assignee in bankruptcy was defendant. Plaintiffs' testimony was objected to on the ground that it was not admissible under a statute forbidding such testimony in a suit against an executor, administrator or guardian.

The Court held that this statute did not apply to a suit against an assignee in bankruptcy, saying by Woods, J., at page 876:

> "The witnesses admitted by the Circuit Court were not excluded by the terms of this statute. The suit in which they testified was not an action by or against an executor, administrator, or guardian. But the counsel for the plaintiffs insists that the policy of the act applies to suits by or against assignees as well as to suits by or against executors, administrators, or guardians, and that we ought to construe the act so as to include such suits. We cannot concur in this view. The purpose of the act was to remove generally the old incapacity to testify imposed on parties or persons interested in the suit. This was done by a sweeping provision,

subject to certain well defined exceptions, but the exceptions did not include suits by or against assignees in bankruptcy. We cannot insert the exception. *When a provision is left out of a statute, either by design or mistake of the legislature, the Courts have no power to supply it. To do so would be to legislate and not to construe.*" (Italics ours.)

See, also,

U. S. vs. *Shing Shun & Co.*, 173 Fed. 844;
Bate Refrigerating Co. vs. *Sulzberger*, 157 U. S. 1;
Merritt vs. *Welsh*, 104 U. S. 694.

D.

THE MEANING OF SECTION 1432-A AS DERIVED FROM COMPARISON WITH ANALOGOUS STATUTORY PROVISIONS.

As we have seen, this law was passed under such circumstances as to justify the possible inference that it was not fully and frankly discussed. Why, if the legislature intended to make the provision that personal examination and prescription by a licensed physician or a duly qualified optometrist must precede the sale of spectacles, did the Legislature not follow the very simple precedent of another chapter of the Education Law dealing with pharmacists and druggists? Medicines, even harmless medicines, may, with certain statutory exceptions, only be sold in registered pharmacies or drug stores (Education Law, Sec. 1354), and no one may

> "engage in, conduct, carry on or be employed in the * * * retailing of drugs, chemicals, medicines, prescriptions or poisons within this state",

except under the provisions of the law. And the law then, in great detail, shows what may be done by the registered or licensed pharmacist or licensed druggist and the apprentice. The difference in the statutes is most obvious and of vital significance.

It is to be noted that none of the provisions of the Education Law with respect to the various professions, excepting only the Pharmacy Law, refers to the sale of merchandise. The practice of optometry (Section 1425) is defined as follows:

> "A person practices optometry * * * who by any means or methods, other than by the use of drugs, diagnoses any optical deficiency or deformity, visual or muscular anomaly of the human eye, or prescribes lenses, prisms or ocular exercises for the correction or relief of the same, or who holds himself out as being able so to do. * * *."

The Practice of Medicine (Sec. 1250), of Dentistry (Sec. 1300), of Veterinary Medicine (Sec. 1325, subd. 6), and of Chiropody (Sec. 1414), are defined in the same way with respect to diagnosis and treatment.

Only in the case of Pharmacy does the definition of the practice of the profession involve the selling of a product. Education Law, Section 1354:

> "Except as prescribed in this article, it shall not be lawful for any person to practice as a pharmacist, druggist, apprentice or storekeeper, or to engage in, conduct, carry on, or be employed in the dispensing, compounding or retailing of drugs, chemicals, medicines, prescriptions or poisons within this state. * * *."

It is clear, therefore, that in the deliberately planned scheme of the regulation of professions the Legislature did not deem it wise to classify optometry with pharmacy, but rather with medicine, dentistry, veterinary medicine, and chiropody. That which is regulated in each of these cases by the various provisions of the Education Law is the practice of a profession or rendition of a personal service. That which is regulated in the Pharmacy Law is much more the selling of merchandise, and even there the sale of all drugs is not forbidden but the Law expressly permits the unrestricted sale of specifically mentioned drugs and poisons and

of proprietary medicines (Sec. 1361). In the light of the careful and clear modes of expression adopted in other parts of the Law and in this very article on Optometry, can we say that the Legislature by Section 1432-a meant to limit the selling of spectacles to optometrists and registered physicians and to forbid the selling of spectacles except by them? To us it seems clear that the language of Section 1432-a cannot be tortured into such a meaning.

With excellent models before it, the Legislature chose not to say that only registered optometrists or licensed physicians could or should sell spectacles, but merely said that a person of either of these specific classifications must be "somewhere in the offing" whenever spectacles are sold. The statute *nowhere requires* the physician or optometrist to take part in the sale of the spectacles, much less examine the eyes and prescribe.

POINT 3.

Section 1432-a is not reasonably calculated to promote public health and has no real and substantial relation to that end.

Reading the law as it is written, and without gloss or addition or amendment by the Court, it is clearly invalid.

We shall not carry coals to Newcastle by burdening the learned Court with a multitude of citations supporting, explaining and limiting the police power and commenting upon valid statutes enacted in the exercise of the police power and invalid attempts to exercise the power at the expense of the citizen.

A law passed in purported exercise of the police power is valid only if it bears some reasonable and real relation to the protection of the public. The only protection which the legislature could possibly conceive the public needed in the purchase of spectacles would be the *protection resulting from ex-*

amination and prescription. **But, as we have seen, this law does *not* provide for examination and prescription, and, therefore, cannot be valid.**

From the multitude of cases, both in this court and the Court of Appeals of New York, which uphold this *rule of reason*, we briefly quote the following:

> *Nectow* vs. *City of Cambridge*, 277 U. S. 183, at page 188:
>
> "The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and, other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare."
>
> *Jay Burns Baking Co.* vs. *Bryan*, 264 U. S. 504.
>
> By Mr. Justice Butler, at page 513:
>
> "Constitutional protection having been invoked, it is the duty of the Court to determine whether the challenged provision has reasonable relation to the protection of purchases of bread against fraud by short weights, and really tends to accomplish the purpose for which it was enacted. * * *."
>
> At page 517:
>
> "Imposition through short weights readily could have been dealt with in a direct and effective way. For the reasons stated, we conclude that the provision, that the average weights shall not exceed the maximums fixed, is not necessary for the protection of purchasers against imposition and fraud by short weights and is not calculated to effectuate that purpose, and that it subjects bakers and sellers of bread to restrictions which are essentially unreasonable and arbitrary, and is therefore repugnant to the Fourteenth Amendment."

Louis K. Liggett Co. v. Baldridge, U. S. Sup. Ct., Oct. Term, 1928 (49 Sup. Ct. Rep. 57).

By Mr. Justice Sutherland, at page 59:

"The act is sought to be sustained specifically upon the ground that it is reasonably calculated to promote the public health; and the determination we are called upon to make is whether the act has a real and substantial relation to that end or is a clear and arbitrary invasion of the appellant's property rights guaranteed by the Constitution. * * * The police power may be exerted in the form of state legislation where otherwise the effect may be to invade rights guaranteed by the Fourteenth Amendment only when such legislation bears a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare. Here the pertinent question is: What is the effect of mere ownership of a drug store in respect of the public health? * * *

In the light of the various requirements of the Pennsylvania statutes, it is made clear, if it were otherwise doubtful, that mere stock ownership in a corporation, owning and operating a drug store, can have no real or substantial relation to the public health; and that the act in question creates an unreasonable and unnecessary restriction upon private business. * * * The claim, that mere ownership of a drug store by one not a pharmacist bears a reasonable relation to the public health, finally rests upon conjecture, unsupported by anything of substance. This is not enough; and it becomes our duty to declare the act assailed to be unconstitutional as in contravention of the due process clause of the Fourteenth Amendment."

Nowhere has the law been better stated than in *People* vs. *Ringe*, 197 N. Y. 143, 149:

"A statute passed pursuant to the police power should be reasonable. Its real purpose must be to protect the public health, morals or general welfare. A statute cannot, under the guise of the police power, but really to affect some purpose not within such power, arbitrarily interfere with a person or a property right. The statute under consideration unnecessarily interferes in several par-

ticulars with that liberty of person and property guaranteed by the Constitution."

In what possible way does the presence of an optometrist or physician at or near a counter where spectacles are sold, or the fact that he is in charge of such a counter, help the public? The sale will be made under this law exactly as it is made today and as described in the two complaints. A customer comes in, uses the test card, selects the spectacles from the sample card, picks out what he wants, pays for it and goes out. How is this process better for public protection if an optometrist be present in the store? He does not examine; he does not prescribe. The law does not require this, and such a requirement cannot be read into it, except by an unwarranted assumption of judicial legislation. Suppose that Roschen in his drug store has an optometrist sitting there all day long. Is it conceivable that under this statute, if one of Roschen's clerks, under such circumstances, sells a pair of spectacles to a purchaser, who simply selects the spectacles, and the purchase and sale are made without the intervention of the optometrist, that any Court would convict Roschen of a violation of the law? He has exactly complied with what the statute requires, and for failing to do something that the proponents of the statute may have wished, but surely did not enact, *he cannot be punished.* Therefore, to require Roschen in his one store, and Kresge in its fifty, to pay an average of $50 a week to an optometrist in order to be able to transact a business of less amount weekly than his salary would be requiring them to do a futile thing so far as the public welfare is concerned, and no Court will permit the legislature to require of citizens the doing of futile things.

Many precedents, interesting because of their facts, are in the law books. We cite a few:

City of Chicago vs. *Netcher*, 183 Ill. 104,

affirming a reversal of the conviction of Netcher, the owner of a department store, for violating an ordinance making it

unlawful for any person doing business where dry goods, clothing, jewelry and drugs are sold, to have exposed for sale or sell meats, fish, butter, etc.

State vs. *Brown*, 37 Wash. 97.

This case held invalid a Washington statute requiring owners of dental parlors to be licensed dentists. See, also:

Buchanan vs. *Warley*, 245 U. S. 60;
Meyer vs. *State of Nebraska*, 262 U. S. 390.

POINT 4.

The propriety of granting equitable relief in these cases is clear.

Upon the Attorney General's motions to dismiss, he argued that there was no equity in the bills and that even though the statute be unconstitutional, plaintiffs should be left to their remedy by defending prosecutions. He also claims that nothing is said in the papers showing irreparable injury.

Let us take up the latter question first. Each complaint shows that the plaintiff will be driven out of this business if the law be enforced because the cost of hiring a physician or optometrist will exceed not only the amount of his profits but the amount of his gross business (R., 6, 88). There are no answers in these cases and the following allegations of the complaint are not denied. In the *Kresge* case (R., 84-85), that plaintiff's sales in the State of New York exceed $20,000 per annum at a direct profit of $5,000 per annum, and the Miller affidavit (R., 10) shows that these spectacles sell at not to exceed $1 a pair at retail. The Kresge complaint further shows that it would not be possible for plaintiff to continue in business if it were required to employ a duly qualified optometrist or physician; that the cost of hiring such a person would be excessive and would exceed plaintiff's gross

income as well as plaintiff's profits from the business (R., 88). The Roschen complaint simply sets forth the facts requisite to give the District Court jurisdiction (R., 2). The complaints also show, and the Court will take judicial notice of the fact, that each sale of spectacles constitutes a misdemeanor, and that, therefore, in violating the law without the protection of an injunction the plaintiffs would subject themselves to *repeated prosecutions* and the Manley affidavit (R., 69) states in so many words that it is the defendants' intention to institute these prosecutions. These allegations sufficiently show the irreparable injury to be suffered by the plaintiffs if they are not protected by the Court. The law is clear that this Court under such circumstances should protect the plaintiffs. In the case of

Tyson vs. *Banton*, 273 U. S. 418,

this Court said at page 427:

> "This suit was brought to enjoin respondents from proceeding either at law or in equity to enforce the last named section, and from revoking plaintiff's license, enforcing by suit or otherwise the penalty of the bond or prosecuting criminally appellant or any of its officers or agents for reselling or attempting to resell any ticket or other evidence of the right of entry to any theatre, etc., at a price in excess of 50 cents in advance of the printed price. The bill alleges threats on the part of appellees to enforce the statute against appellant, to forfeit its license, enforce the penalty of its bond and institute criminal prosecutions against appellant, its officers and agents. It is further alleged that the terms of the statute are so drastic and the penalties for its violation so great (imprisonment for one year or a fine of $250 or both) *that appellant may not resell any ticket or evidence of the right of entry at a price beyond that fixed by the statute even for the purpose of testing the validity of the law, and that appellant will be compelled to submit to the statute whether valid or invalid unless its suit be entertained, and thereby will be deprived of its property and liberty without due process of law and denied the equal protection of the law, in contravention*

of the Fourteenth Amendment to the Federal Constitution. Following the rule frequently announced by this Court, that *'equitable jurisdiction exists to restrain criminal prosecution under unconstitutional enactments, when the prevention of such prosecutions is essential to the safeguarding of rights of property,'* we sustain the jurisdiction of the District Court. Packard v. Banton, 264 U. S., 140, 143, 44 S. Ct. 257, 68 L. Ed. 596, and cases there cited." (Italics ours.)

See, also,

Truax v. *Raich*, 239 U. S. 33;
Packard v. *Banton*, 264 U. S. 140;
Terrace v. *Thompson*, 263 U. S. 197.

POINT 5.

The Court below erred in its construction of the law and its decision.

The flaw in the reasoning of the learned Statutory Court is easily perceived. It assumes that the New York Act bears a real and substantial relation to the public welfare, when in fact the Act does not even furnish a glimmering possibility of benefitting the public. Instead, it imposes unreasonably burdensome requirements on the appellants, automatically rendering it impossible for them to carry on their businesses. The statute in question was conceived in iniquity. Its real purpose was not to benefit the public but to furnish positions to optometrists. This purpose was cloaked behind the veil of the police power of the State of New York.

This Court recently pierced the protective armor of the police power when it was asserted for an ulterior or selfish purpose. *Foster Fountain Packing Co.* v. *Haydel*, U. S. Sup. Ct. Oct. Term 1928, 49 Sup. Ct. Rep. 1, Advance Sheets of November 1, 1928. In that case a Louisiana statute forbade the export of shrimp from the state unless they had been

shelled. The professed purpose of the statute was to protect the wild life or game of the state. Actually, it did not forbid the export of shelled shrimp from the state, and thus it did not protect anything for residents in the state, except that it ruined shelling plants outside the state and required, if enforced, the establishment of shelling plants within the state. This Court held the Louisiana statute unconstitutional, disregarding the purported object of the statute to conserve wild game for residents of the state, and scrutinizing the actual purpose, which was to require the establishment of shelling plants within the State of Louisiana, to ruin the business of established concerns without the state.

Similarly, in *Adams* v. *Tanner*, 244 U. S. 590, the State of Washington made it unlawful to conduct an employment agency business for a fee. No one doubted that such agencies were subject to proper regulation under the police power of the state, if that power were properly invoked. This Court stated that there was nothing inherently immoral or dangerous to the public welfare in a person acting as the paid representative of another to find a position in which he could earn an honest living.

By the New York Act, the State of New York has made it unlawful and criminal to sell eyeglasses, spectacles and lenses at retail unless a duly licensed physician or duly qualified optometrist be in charge of the booth, counter or place where such articles are sold. It may be that the State might require that the sale of spectacles at retail must be preceded by examination, test or prescription if the use of spectacles is even possibly injurious. We never have denied this power if it were properly exercised, except as to the inherently harmless magnifying lenses. What we have contended in the Court below, and now contend, is that there is no real and substantial relation between the legislation enacted by the State of New York and the public health or welfare, particularly since all the evidence shows the use of certain kinds of spectacles (those sold by plaintiffs) to be useful in most cases and harmful in none.

A state legislature cannot render legislation constitutional by the mere label or denomination that it is for the public welfare, if in fact it is not. The people of the State of New York were not being harmed by the sale of ordinary convex spherical lenses. These are merely magnifying glasses, which cannot and do not injure the sight in any way. On the contrary, the people of the State of New York were being benefitted by the sale of these lenses at a very reasonable price. They will not receive greater care or attention in connection with the purchase of lenses under the provisions of the new Act, than they received before. The duly licensed physician or duly qualified optometrist is not required, under the terms of the statute, to make the sale. The same clerks who have heretofore dealt with the public will continue to make the sales. The physician or optometrist employed need not in any way exert himself, yet his position will be secure, for, by the terms of the statute, the store-owner is required to employ a duly licensed physician or duly qualified optometrist if he is to continue the sale of spectacles.

The words of Mr. Justice McReynolds, in *Adams* v. *Tanner*, *supra*, condemning the Washington statute, find ready application to the present appeal. "Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked" (pp. 594-5).

A statutory provision which is not a legitimate police regulation cannot be made such by being placed in the same Act with a police regulation, or by being enacted under a title that declares a purpose which would be a proper exercise of that power. *Coppage* v. *Kansas*, 236 U. S. 1. As Mr. Justice Grier said, in the *Passenger Cases*, 7 How. (U. S.) 283, at page 458:

> "Its true character cannot be changed by its collocation * * *."

This Court will not hesitate to grasp the real purpose of the legislation (casting aside the professed purpose), which is aimed to further private selfish interest, as this undoubtedly is, and condemn it as unconstitutional. The provisions of the Act do not require that the physician or optometrist make the sales, or examine the purchaser's eyes before permitting a sale to be made. It simply states that he shall be in charge of the booth, counter or place where the articles are sold. His presence alone, or his management of the shop, will not give additional protection to the public, as the sales of mere magnifying glasses (*supra*, Point I) cannot and do not injure the sight in any way. No one was injured under the old course of conducting the sale of spectacles; there was no impending danger of ruining the eyesight of thousands; there was no public demand that optometrists be placed in charge of the selling agencies for ordinary magnifying lenses.

The learned Statutory Court states that it is not disputed "that a more certain and scientific adjustment of spectacles and a more complete correction of poor eyesight may be obtained when the lenses are prescribed and fitted by a registered optometrist than when selected from a mass of different spectacles by the customer himself without any aid." Without questioning this statement of the learned Court, the whole point of the instant case is THAT THE STATUTE IN QUESTION DOES NOT REQUIRE THE OPTOMETRISTS TO MAKE AN EXAMINATION OF THE PURCHASER'S EYES BEFORE A SALE IS MADE. The Statutory Court seems to have quite failed to grasp the point.

The illustrations cited by the Court below, of life preservers, life boats, fire escapes, and rear vision reflectors, to show that there was no necessity for the statute in question to provide specifically that the optometrists must make an examination of the purchaser's eyes before selling lenses, are not in point.

First. It is carrying analogy to absurdity to liken the protection of passengers on steamers, of residents of tene-

ments and of the public on crowded thoroughfares, to the protection of the public from malpractice by unqualified persons in the field of optometry, etc. The ship owner must protect those whom he undertakes to transport; the tenement owner must protect those whom he houses; the automobilist must protect the public against his inherently dangerous machine. And this duty of protection extends far beyond the simple and obvious details noted by the learned Statutory Court. These laws present obvious ways of avoiding danger in emergencies. The butcher, the baker, the grocer, the seller of spectacles must protect his customers against dangerous merchandise; but that does not require the presence of meat or bread inspectors in each shop. Assuming what is quite contrary to the fact,—that there is some inherent or possible danger in every sale of magnifying glasses,—does the presence of the optometrist at the counter avoid this danger? Obviously, no, because the purchaser of the spectacles would have to pay a fee to procure the services of the professional man. The analogy might be closer if the ship owner were permitted to charge for the life preservers; the tenement house owner were permitted to charge admission to the fire escape; or if the chauffeur had to drop a penny or a nickel in a slot before he could adjust the rear vision mirror. It seems an absurdity to try to create an analogy between the rendition of professional service by a human being for a fee and the provision of obvious safeguards free of charge in times of emergency.

Second. We are here construing a *penal* statute and cannot indulge in loose construction.

Third. There is no need to provide that a person on a sinking vessel at sea must use a life preserver or enter a lifeboat as his vessel founders. The recent "*Vestris*" tragedy is sad proof of that. People are generally too anxious and worried to outfit themselves voluntarily with life belts at times of grave danger at sea. Further, *no law* requiring persons in a sea tragedy to use life preservers or lifeboats, or requiring

persons in a burning tenement to use the fire escapes in descending to the street, would be worth enacting. The panic, excitement and disorder accompanying every tragic event, both on land and sea, would override the most carefully drawn act ever prepared. However, such a provision could have been made in the act requiring the physician or optometrist to make an examination of the purchaser's eyes before selling him spectacles, and without such a specific provision the act in question is unconstitutional. This provision would not be rendered nugatory and ineffective by reason of panic, excitement and disorder, because the purchase of a pair of ordinary magnifying lenses is a leisurely transaction.

Fourth. The rear vision reflector illustration. An operator of a vehicle naturally and instinctively uses the rear vision mirror for convenience and for his own protection. If legislation were enacted requiring him to look into it every time he makes a turn, it would be impossible to enforce, and drivers would be very likely to disregard the mandate of the statute. Perhaps legislators realized the uselessness of such a provision and the possible trouble resulting therefrom, and, thinking discretion the better part of valor, enacted the law without mention as to its use. The rear vision mirror saves the operator of the vehicle from turning his head or leaning out the side of his car,—and it is a decided convenience. The driver recognizes its utility, knows what the article is, and makes use of it.

Furthermore, experience has shown the necessity for such equipment to avoid accident,—and by making the reasonable rule of practice a compulsory requirement, the legislature simply established a new statutory criterion of negligent conduct.

The average purchaser of lenses entering a shop is not gifted with a supernatural foresight or insight and intelligence which would enable him to single out from among six or eight salesmen, possibly more or less, the all necessary optometrist. The optometrist has no outwardly distinguishing characteristics. His practical utility in the sale of mere

magnifying lenses, which do not and cannot injure the eyesight, is not conceded, but vigorously disputed.

This Court is familiar, without question, with the distrust in which the public holds optometry. The average person says that he never saw a man consult an optometrist without having glasses prescribed. This distrust may be ill-founded in the public mind, but it is certainly indicative that customers will not flock to the optometrist for counsel and advice when purchasing ordinary magnifying lenses. They will not turn to the optometrist, as the driver of a truck looks to the rear vision mirror, for guidance.

The two Minnesota decisions relied on by the Statutory Court in its opinion are fundamentally different in nature from the present appeal, and no authority whatever, because clearly distinguishable. In *State* v. *Zotalis*, 172 Minn. 132, the first of the two cases, the defendant was convicted of violation of Sec. 5814, G. S. 1923, which prohibited anyone not a registered pharmacist, or a dealer having such a pharmacist in charge of his place of business, from retailing drugs, medicines, or poisons, excepting, however, 23 articles of common use. Defendant ran a confectionery store, was not a pharmacist, and did not employ one. He sold aspirin, and it was proved that aspirin was a drug. On appeal to the Supreme Court of Minnesota his conviction for violation of the statute was affirmed. How does that decision determine the present appeal. The sole question there was whether aspirin was a drug. If it was proved to be, then defendant has violated the statute. The Court specifically stated, at page 766: "It is not questioned that the sale of drugs, medicines or poisons may be regulated in the exercise of the police power". (citing authorities.)

In the case at bar, appellants concede it is the state's right, under its police power, to prescribe an examination of the purchaser's eyes before spectacles which may injure him are sold to him. Such a provision would doubtless serve a useful and beneficial purpose,—someone other than the optometrist would benefit. It would not be a piece of "monopoly" legis-

lation. The optometrist's services would be of some reasonable benefit to the public. Such legislation undoubtedly should be sustained, as it would have some reasonable reference to the public health and welfare. Affirmative duties would be placed upon the optometrist which are *not* imposed in the New York Act. Their absence is fatal to its validity in the eye of the fundamental law.

In *State* v. *Levine*, 173 Minn. 322, the second case cited by the Statutory Court, the Minnesota Court stated (p. 343):

> "Having in view that the SOLE PURPOSE of Sec. 5814 is to prohibit the dispensing of drugs by other than duly registered pharmacists and registered assistants, we think a proper construction to be that a registered pharmacist owner is at all times in charge while during short intervals of the day he is at his meals within easy reach and on call, and the one left in charge of the store does not undertake to sell any drug in his absence." (Emphasis ours.)

The words, "sole purpose," completely distinguish that case from the case at bar. The sole purpose of the New York Act was to create a monopoly for optometrists, to create positions for them, and not to protect the public by examination or prescription. If the sole purpose of the New York Act was to require examination of the purchaser's eyes before sale, then the statute might be sustained, but it does *not* require examination; it does not require that the optometrist make the sale; it merely states that an optometrist "be in charge of and personal attendance at the booth, counter or place where such articles are sold." This being a PENAL STATUTE, words cannot be interpolated by construction, nor can the statute itself be so construed as to widen unnecessarily the language therein.

This Court will therefore pierce through the professed purpose of the New York Act and condemn the real monopolistic purpose which motivated its enactment, in the same manner as it condemned the Louisiana statute in *Foster Fountain Packing Co.* v. *Haydel*, *supra*.

The learned Statutory Court endeavored to point out legal differences between the recent decision of this Court in *Louis K. Liggett Co.* v. *Baldridge*, 49 Sup. Ct. Rep. 57, U. S. Sup. Ct. Oct. Term, 1928, and the case at bar. No effort was made by the lower court to question the soundness, however, of the law laid down in that decision. This Court wrote, two justices dissenting:

> "The police power may be exerted in the form of state legislation where otherwise the effect may be to invade rights guaranteed by the Fourteenth Amendment *only when such legislation bears a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare.*" (Italics ours.)

Under that rule, though the present appeal of course differs from the *Liggett* case on the facts, there is no "real and substantial relation" in this case between the New York Act and the public welfare. There is no reasonably certain correction of the alleged evils, if any, under this Act. There is a faint *possibility* that *perhaps* the public *might* benefit *if* the optometrist conscientiously should undertake an examination of the purchaser's eyes, which he is under *no legal obligation* to do under the preposterous provisions and terms of the New York Act.

POINT 6.

The Court below erred in its reasons for dismissing the bill as against the defendants other than the attorney general.

The bill of complaint in the *Roschen* case alleges that it is the public and official duty of the defendants in this suit to enforce the law (Section 1432-a) and that they threatened to enforce same against this plaintiff and others similarly situated (R., 5). The plaintiff further alleges that the defendant will institute proceedings against him (R., 6). Sim-

ilar allegations appear in the Kresge complaint (R., 88, 89). The defendants have never answered these bills of complaint nor does it appear that these allegations were ever in issue. The learned Statutory Court based its dismissal of the complaint as against all but the Attorney General on those provisions of Section 1433 of the Education Law which place the onus of prosecution upon the Attorney General. They overlooked, however, the last two sentences of the section:—

> "All violations of this act when reported to the department and duly substantiated by affidavits or other satisfactory evidence shall be investigated and if the report is found to be true and the evidence substantiated the department shall report such violations to the attorney-general and request prompt prosecution. The regents may appoint such inspectors as are necessary to be paid from the funds received under this act at such salaries as they may determine for the purpose of the investigation of such violations."

The Court will see that even the preliminary inspection by the inspectors may be irksome and burdensome to the plaintiff, and if the Court finds with the plaintiffs on the larger question, it should afford them relief against those who are actually threatening the injury.

POINT 7.

The decrees appealed from should be reversed, preliminary injunctions should be granted and the cases restored for trial.

March 18, 1929.

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